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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 656

BARBARA ELFBRANDT,

Petitioner,

vs.

IMOGENE R. RUSSELL, *et al.*

PETITIONER'S BRIEF

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IMOGENE R. RUSSELL, *et al.*

PETITIONER'S BRIEF

a) Reference to the Official and Unofficial Reports of the Opinions Delivered in the Courts Below:

Elfbrandt v. *Russell,* 397 P. 2d 944 and 381 P. 2d 554.

b) Concise Statement of Grounds on Which the Jurisdiction of This Court Is Invoked:

The jurisdiction of this Court is invoked by reason of fact that the petitioners allege that the statute in question violates the United States Constitution for various reasons hereinafter set forth and that the Supreme Court of the State of Arizona erred in affirming the Constitutionality of such statute as it applies to the petitioners and others similarly situated.

(i) The original judgment in the Supreme Court of the State of Arizona was May 1, 1963. Petitioner filed a Motion for Rehearing and the State Supreme Court denied same on May 28, 1963.

(ii) The petitioner then filed an original Application for Writ of Certiorari in the United States Supreme Court, which was submitted on August 16, 1963, and was given No. 553 Misc. October Term, 1963. The United States Supreme Court granted the Writ of Certiorari and on June 15, 1964, remanded the case back to the Arizona State Supreme Court for review of its original decision in light of the U.S. Supreme Court case in the matter of *Baggett* v. *Bullitt,* 12 L. Ed. 2d 377. This action on the part of the United States Supreme Court was reported in 378 U.S. 127, 84 S. Ct. 1658 and 12 L. Ed. 2d 744.

Thereafter, the Petitioner filed her second brief in the State Supreme Court, with the State filing responsive brief. Oral argument was heard before the State Supreme Court and on December 30, 1964, the State Supreme Court issued its Opinion affirming its prior decision and denying Petitioner relief. On January 29, 1965, Petitioner filed a Motion for Rehearing before the State Supreme Court of Arizona and this Motion was denied on February 17, 1965.

Within the 90-day time period set forth in Rule 22 of the Rules of the Supreme Court of the United States, to-wit: On May 10, 1965, Petitioner filed Application for a Writ of Certiorari and for leave to proceed in forma pauperis. On October 11, 1965, the Court entered its Order granting leave to proceed in forma pauperis and the petition for Writ of Certiorari was granted.

c) Constitutional Provisions, Treaties, Statutes, Ordinances and Regulations Which the Case Involves:

The statutory provision believed to confer upon this Court jurisdiction to review the judgment in question by Writ of Certiorari is Article III, Par. 1, United States Constitution, 28 U.S.C.A., Par. 1257:

"Final judgments or decrees rendered by the highest court of a state in which a decision would be made be reviewed by the Supreme Court as follows: . . .

(3) By Writ of Certiorari where the validity of a treaty or statute of the United States is drawn in question on the grounds of its being repugnant to the Constitution, treaty, or laws of the United States or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

The Constitutional provisions involved are the First Amendment to the United States Constitution, Fifth Amendment to the United States Constitution, Sixth Amendment, and Fourteenth Amendment, Article I, Section 10. Texts of these provisions of the United States Constitution are set forth verbatim in appendix annexed hereto. 38-231, Chap. 2, Title 38, A.R.S. 1956, set forth hereafter in the appendix.

d) Questions Presented for Review:

Re the Sixth Amendment to the U.S. Constitution:

Is the Arizona statute (38-231, Chap. 2, Title 38, A.R.S. 1956) a statute defining a crime within the purview of the meaning of the Sixth Amendment to the U.S. Constitution, by reason of its providing:

a) A penalty for false swearing;

b) A necessity for an oath and the danger of being placed in jeopardy for purported false swearing;

c) A statute providing a standard of conduct on the part of the employees of the State of Arizona and other gov-

ernmental agencies of the State, subject to administrative regulation?

And, if the statute comes within the purview of the mandate of the Sixth Amendment to the U.S. Constitution, is its language so vague:

a) That men of common intelligence must necessarily guess at its meaning?, or

b) That it fails to unequivocally warn the prospective State employee of the type of conduct which can be the occasion for depriving him of his liberty or property?, or

c) That the definition of the standard of conduct which is the subject of administrative regulation is so indefinite as to not provide a standard of conduct, by reason of its wording: calling upon the employee to not "knowingly", "willfully", "commit or aid", "advocate the overthrow", or "knowingly or willfully become or remain a member of the Communist Party" or a "successor organization of the Communist Party" or "a subordinate organization of the Communist Party" or have "knowledge of unlawful purpose"—all terms of this statute with which one must be familiar and on the basis of which terms one must swear.

Bill of Attainder (Article I, Section 10, U.S. Constitution):

Whether or not the statute is a Bill of Attainder and forbidden under Article I, Section 10 of the U.S. Constitution, in that as the statute demands of any public employee within the State, before he may receive remuneration, that he sign an oath negating his affiliation at that point and for the future with the proscribed organizations; and automatically, upon the failure to sign the oath, the particular employee is proscribed and without salary.

Violation of the Fifth Amendment to the U.S. Constitution:

Whether or not the statute, in not granting a person a trial or hearing and, where he is already employed, having him sign an oath for continued remuneration, is not in effect a method of forcing the person to incriminate himself and therefore violative of the Fifth Amendment to the U.S. Constitution.

Equal Protection of the Laws Guaranteed Under the Fourteenth Amendment:

Whether or not the statute, by making its provisions applicable only to public employees or State employees of one type or character, and not applicable to all citizens, and therefore placing a higher burden unjustifiably on one part of the citizenry than another, therefore violates the Equal Protection of the Laws guaranteed by the Fourteenth Amendment to the U.S. Constitution;

And if it does so discriminate unequally, whether or not there would appear to be legally sufficient distinction between the danger to the State from subversion by its general citizens as opposed to danger to the State from subversion by its public employees, as to warrant the distinction in treatment as provided for by the statute,

And therefore whether it does not in effect violate the equal protection of the laws guarantee of the Fourteenth Amendment to the U.S. Constitution?

Due Process under the Fourteenth Amendment to the U.S. Constitution and *Freedom of Speech and Assembly* under the First Amendment to the U.S. Constitution:

Whether or not the statute, by not providing any form of hearing on the issue of loyalty, and denying to public em-

ployees remuneration upon failure to take the oath, is a violation of the Due Process guarantees of the Fourteenth Amendment to the U.S. Constitution as:

1. A taking of property;

2. A violation of Freedom of Speech and Assembly as guaranteed by the First Amendment to the U.S. Constitution.

Violation of Freedom of Speech and Assembly:

That, whereas there were no legislative findings, or inadequate legislative findings, to justify the Legislature's infringing upon the rights of the petitioners to Freedom of Speech and Assembly under the First Amendment to the U.S. Constitution; and

Whereas the legislation would appear to be ineffectual for any of the purposes that it would purportedly answer and the damage arising by its application to the Petitioner and all persons similarly situated would, to the body politic, be so great;

The Legislature did not and does not have sufficient legislative reason to invade the Constitutional rights of Freedom of Speech and Freedom of Assembly of the Petitioners.

Whether or not the definition of illegal advocacy as being proscribed under the State statute is so broadly worded as to constitute a violation of Freedom of Speech and Assembly and to deny that type of advocacy of forceful overthrow of the Government which is Constitutionally protected under the pertinent provisions of the United States Constitution, with particular reference to the definition of the Constitutional protection of certain forms of advocacy

of the forceful overthrow of the Government as set forth in *Baggett* v. *Bullitt, supra.*

e) Concise Statement of the Case:

This is an action brought by the plaintiff, Barbara Elfbrandt, for herself and for all others similarly situated; in other words, a class action on behalf of all persons subject to the effect of the pertinent statute, to-wit: 13-707 A.R.S., 13-707.1 A.R.S. and Section 38-231 A.R.S. The complaint was brought in the Superior Court of the State of Arizona in and for the County of Pima. An original Petition for Temporary Restraining Order and Orders to Show Cause and Injunction was requested and each denied by subsequent court action. (See Transcript of Record, U.S. Supreme Court, pages 2-13.) The trial of the action on the complaint was determined by the trial court upon a Transcript of Stipulations and Statement of Fact. (See Transcript of Record, U.S. Supreme Court, pages 36-37.)

The question provided by the complaint and the stipulations was whether or not Section 38-231, Chapter 2, Title 38 A.R.S. was constitutional under the pertinent Constitutional guarantees of the Federal and State Constitutions. The trial court determined the issue adversely to the plaintiff and decided that the pertinent statutes were in fact Constitutional. From this decision, the plaintiff appealed to the Supreme Court of the State of Arizona.

After submission to the Supreme Court of the State of Arizona, by brief and oral argument, that Court affirmed the Constitutionality of the statute against all attacks raised by petitioner on all U.S. Constitutional grounds raised.

Subsequent to the decision of the State Supreme Court, petitioner filed a Motion for Rehearing which was denied.

Subsequently, petitioner applied for an original Writ of Certiorari to the U.S. Supreme Court, which Writ was granted. The United States Supreme Court remanded the matter to the Supreme Court of the State of Arizona for review by that court of its decision in light of a subsequent Constitutional ruling in the area of the contested matter, as set forth in the United States Supreme Court's decision in *Baggett* v. *Bullitt, supra.* (See Transcript of Record, U.S. Supreme Court, page 68.)

In compliance with the Order of the United States Supreme Court, the Arizona State Supreme Court requested counsel, including the American Civil Liberties Union, to file briefs. The briefs were filed by the Petitioner and by the American Civil Liberties Union and by counsel for the State of Arizona; oral argument was held before the State Supreme Court; and the State Supreme Court affirmed its previous decision denying all attacks of lack of Constitutionality of the statute in question and affirming its previous decision. (See Transcript of Record, U.S. Supreme Court, page 71.) Petitioner then filed a timely Motion for Rehearing before the State Supreme Court and on February 17, 1965, the Arizona State Supreme Court denied Petitioner's Motion for Rehearing. From this course of decisions, Petitioner renewed her application for Writ of Certiorari, filing same on May 10, 1965. Certiorari was granted by this Court on October 11, 1965.

f) Argument and Conclusion:

In 1961, the 25th Legislature of the State of Arizona passed Arizona Revised Statute 38-231, demanding that every employee of every board, commission, agency and independent office of the State and any of its cities, towns,

school districts and public institutions should from that point on not pay any more salary to any employee who failed or refused to sign a disclaimer oath, in the following words:

"State of Arizona, County of .....

I, (type or print name) do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution and laws of the State of Arizona; that I will bear true faith and allegiance to the same, and defend them against all enemies, foreign and domestic, and that I will faithfully and impartially discharge the duties of the office of (name of office) according to the best of my ability, so help me God (or so I do affirm).

.....

(Signature of officer or employee)"

However, the *meaning* of the oath is set forth in Section E of the particular statute, to-wit:

"Any officer or employee as defined in this section having taken the form of oath or affirmation prescribed by this section, and knowingly or wilfully at the time of subscribing the oath or affirmation, or at any time thereafter during his term of office or employment, does commit or aid in the commission of any act to overthrow by force or violence the government of this state or of any of its political subdivisions, or advocates the overthrow by force or violence of the government of this state or of any of its political subdivisions, or during such term of office or employment knowingly

and wilfully becomes or remains a member of the Communist Party of the United States or its successors or any of its subordinate organizations or any other organization having for one of its purposes the overthrow by force or violence of the government of the State of Arizona or any of its political subdivisions, and said officer or employee as defined in this section prior to becoming or remaining a member of such organization or organizations had knowledge of said unlawful purpose of said organization or organizations, shall be guilty of a felony and upon conviction thereof shall be subject to all the penalties for perjury; in addition, upon conviction under this section, the officer or employee shall be deemed discharged from said office or employment and shall not be entitled to any additional compensation or any other emoluments or benefits which may have been incident or appurtenant to said office or employment."

When faced with this legislation, Barbara Elfbrandt, a teacher and Quaker, joined together with other teachers and other public employees to discuss whether in good conscience she or they could sign such an oath, given such a meaning and interpretation by the Legislature. The statute provided for no hearing or any method to get a hearing to determine whether one was loyal or not loyal. With the attendant legislation passed at the same time, to-wit: "The Communist Control Act", Title 14, Chap. 2, Art. 1, A.R.S. 1956, 16-205 and 16-206 (see Appendix for statement), it was clear that in good conscience a great number of people could not sign the oath, with the interpretation provided by the Legislature: not on the basis of a conscionable belief that they were members of any organization that could

clearly be defined as "Communist", but on the basis that as intelligent persons they could not know what the Legislature intended to cover. To submit to a possible perjury prosecution before an unknown jury in a State whipped by Barry Goldwater right-wing Birchite "hard-core" Americanism, would leave one to the gentle mercies of such "juries" in defining "membership", "knowing membership", "affiliated membership", "acts to aid or abet the overthrow by force of the government". One could not in good conscience put oneself in such jeopardy.

This Court should declare the Arizona Statute unconstitutional for the first and prime reason that the Arizona statute, as presently constituted, is a denial of procedural Due Process as guaranteed by the Fourteenth Amendment to the U.S. Constitution, in that no hearing is provided before termination of a public employee's salary upon his refusal, for any reason, to sign the oath demanded by the Legislature. This legislation was adopted without any public hearing.

The Legislation Is a Violation of the Guarantee of Procedural Due Process

The concept of due process cannot be expressed in precise terms. Broadly speaking, it denotes our sense of what constitutes fairplay in the legal procedures under which a man is tried. *Galvan* v. *Press,* 1954, 347 U.S. 522, 74 S. Ct. 737, 98 L. Ed. 911. Expressed in terms of the relief provided by the writ of habeas corpus it is said that the scope of the writ 'is largely a reflection of our contemporary attitudes towards an ideal of fairness in the administration of justice.' Note, 61 Harv. L. Rev. 657 (1948), quoted in the case of *Brooks* v. *Gladden,* 358 P. 2d at p. 1059 (1961).